No. 20655

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCAL 770, Affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF OF PETITIONER.

ARNOLD, SMITH & SCHWARTZ,
KENNETH M. SCHWARTZ,
ROBERT M. DOHRMANN,
Suite 950,
6404 Wilshire Boulevard,
Los Angeles, Calif. 90048,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.
46

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

As stated in petitioner's Opening Brief, at page 7, the record does not reveal that Boy's Markets, Inc., negotiated any terms of its collective bargaining agreement with the Culinary Union. The testimony of Ida Freed, personnel manager of Boy's Markets, shows that a representative of the Culinary Union brought a copy of a contract to her office in January of 1964, that she read it over and gave it to her supervisor, Mr. Fitzpatrick. [R.T. p. 210.] When Mr. Fitzpatrick received it "(h)e read it over and he said, 'It's okay.'" [R.T. p. 211.] Thereafter the contract was put into final form and executed on February 1, 1964. [R.T. p. 211.]

The above-quoted portion of the counterstatement of the Board also alleges that the contract between Boy's and the Culinary Union covered "*all* snack bar employees in these stores" referring to the four stores in Los Angeles County owned by Boy's which had snack bar and/or take out food services. However, Paul Meister, organizer for the Culinary Union, testified that the contract with Boy's Markets, signed on February 1, 1964, applied to only *one* store, the one located on Crenshaw Boulevard [R.T. p. 99], in which both the Clerks and the Culinary Union had secured authorization cards. [R.T. pp. 17, 19, 22, 24, 29, 30, 79, 82.]

ARGUMENT IN REPLY TO THE BRIEFS OF RESPONDENT AND INTERVENOR.

I.

The Clerks Presented to Boy's Markets a Claim for Recognition Identical in Scope and Validity to That Presented by the Culinary Union.

Both the Board and the Culinary Union in their briefs have taken the position in support of the holding of the Board below that the only real claim of representation made by the Clerks was the claim that the work functions in the snack bars were covered by the Clerks' 1959 agreement with the food markets. This finding by the Board simply does not square with the overwhelming evidence to the contrary contained in the transcript of proceedings before the Trial Examiner.

As stated above, in petitioner's reply to the counter-statement of the case, both the Clerks and the Culinary Union secured authorization cards from all of the employees of Boy's Markets working in the snack bar of the store on Crenshaw Boulevard. There is no dispute that any of the cards obtained by either of the unions are other than genuine. Representatives of each union testified that that store was the only Boy's Market having a snack bar within the jurisdiction of the union [R. T. 99, 179]. Both unions presented their demands for recognition in that one store to the personnel manager of Boy's. [R.T. pp. 99, 180.] It is only at this point that the unions diverged in their further organizational efforts. The Clerks continued to bargain with the Food Employers Council as agent for Boy's for that specific

purpose as set forth in petitioner's Opening Brief, pages 22 through 27. The Clerks did so because the personnel manager of Boy's agreed to let the matter be handled by the Council. [R.T. p. 309.]

The record also shows that no discussion took place between the Clerks and Boy's regarding the extent of the bargaining unit involved. But, when this same personnel manager was contacted by a representative of the Culinary Union, she, for the first time, purported to state her company's position that the appropriate unit for collective bargaining on behalf of snack bar employees consisted of snack bar employees at *all locations* of the employer operating snack bars. It is the grossest form of conjecture to argue, as does the Board and intervenor, that the Clerks never presented a supportable claim of representation of these employees on a multi-store basis because it was only with the assisted union that the employer took a position with respect to the appropriate collective bargaining unit. To now determine that Boy's had no obligations of neutrality under the *Mid-West Piping* doctrine at that point in time when it became aware of conflicting claims in the identical location, the Board, is, in effect, announcing the retroactive abrogation of a rule designed to protect the rights of the employees guaranteed to them by Section 7 of the National Labor Relations Act, 29 U.S.C. Section 157.

With respect to the question of appropriateness of the unit chosen for collective bargaining, it should be noted that nowhere in the decision of the Board, reversing its Trial Examiner, is there a finding as to whether or not any of the claims of representation

made by either competing union were in a unit appropriate for collective bargaining. This deficiency exists despite the citation in the decision (65) of the Board's prior decision in *William Penn Broadcasting*, 93 N.L.R.B. 1104 (1951), a decision dismissing a complaint for failure to show that a claim of representation made by an unassisted union was within an appropriate unit.

The implication from the present decision is that a multi-store unit is appropriate because the Board makes the same error in its decision as does its General Counsel and the Culinary Union in their briefs in finding (64) that the Culinary contract with Boy's covered "All snack bar workers of Boy's in four stores in Los Angeles County." As stated *supra*, the record indicates clearly [R.T. p. 99] that, while the Culinary Union secured authorization cards from a majority of the snack bar employees in four locations it has never acted in response to those authorizations to represent more than the employees at the Crenshaw location. Since it appears that the Culinary Union never intended to represent the employees of Boy's on the multi-store basis and has never done so, whereas the Clerks spent months in negotiations involving the Council and the nine Southern California local unions [R.T. p. 375] and secured authorization cards from all of the snack bar employees within its geographic jurisdiction, petitioner respectfully submits that it was the claim of the Culinary Union which was without merit in that the said union was illegally assisted by Boy's Market when it chose to deal with that union in violation of its representations to the competing union.

II.

A Cognizable, Valid Claim of Representation Imposing a Duty of Neutrality on the Employer Exists Even When Authorization Cards Are Not Secured by Either or Both Unions.

Both the Board and the Culinary Union argue in their briefs that, because an employer may recognize one competing union where the claim of the other is clearly specious, and further because the Clerks in the instant case did not secure authorization cards from a majority of employees of both Von's and Boy's working in their snack bars; it follows that the Clerks' claim is a specious one and both Boy's and Von's were free to recognize and bargain with the Culinary Union. Intervenor, in its brief at pages 10 through 12 goes so far as to argue that, had the employers recognized the Clerks at the Clerks-Food Employers Council negotiations, it would have constituted a violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. Sections 158(a)(1) and (3).

Petitioner submits that these arguments are without merit. A representative claim is not necessarily specious or invalid because it is based upon a history of collective bargaining. Further, even assuming that the intervenor is correct in arguing that bargaining between the Food Employers Council and the Clerks regarding these employees would constitute an unfair labor practice, neither the Clerks as charging party, nor the General Counsel of the Board has sought an order directing the Council to bargain with the Clerks but rather sought an order compelling Boy's, Von's and the Council to desist from recognizing *either* union until one had been certified following a Board election.

In support of the Board's determination that the Clerks' claim in the instant case was not a valid one, both the Board and the intervenor have cited *N.L.R.B. v. Corning Glass Works*, 204 F. 2d 422 (C.A. 1, 1953) and *N.L.R.B. v. Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C.A. 6, 1954). Both cases were noted in petitioner's brief at page 17 as illustrating the early failure of the Courts of Appeals for the first and seventh circuits to apply the Board's ruling in *Mid-West Piping & Supply Co., Inc.*, 63 N.L.R.B. 1060 (1945). The Board itself recognized that its doctrine had not been followed in either case in its decisions shortly thereafter, *Novak Logging Co.*, 119 N.L.R.B. No. 196, 41 L.R.R.M. 1347 (1958); and *Scherrer & Davisson Logging Co.*, 119 N.L.R.B. No. 197, 41 L.R.R.M. 1349 (1958). In each decision, the Board noted, in an identical footnote, that it adhered to its decision in *Mid-West Piping* despite the failure of the circuit to apply it in the *Indianapolis Newspaper* case. The Board further held that the *Corning Glass Works* case was "inapposite" to a factual situation involving current collective bargaining negotiations between the employer and one of the competing unions. The Board pointed out that:

> "In this context, as the cases have repeatedly pointed out, the respondent could not assume to judge for itself upon a showing of authorization cards[6] which of the contending unions was the statutory representative of the employees
>
> * * *
>
> [6]The percentage of authorization cards shown is immaterial . . ." (41 LRRM at 1348.)

In spite of the Board's unwillingness to accept the first circuit's decision in the *Corning Glass Works* case, its general counsel nevertheless has cited the case at page 9 of his brief in support of the Board's order.

With respect to the argument of the intervenor that negotiations between the Clerks and the Food Employers Council constituted unfair labor practices, petitioner respectfully submits that it is wholly irrelevant whether or not such an effect might have flowed from the negotiations which did take place. The weakness of such an argument is demonstrated by the cases intervenor cites in support of its argument. Thus, *Wolfer Printing Company*, 145 N.L.R.B. 70 (1963) held that a union's attempts to include work functions not previously in its bargaining unit without a vote of the employees performing such functions might, when accepted by the employer, constitute violations of Sections 8(a)(1) and 8(a)(3) of the Act. The Board further held that the arguments presented by the bargaining union were "specious." Nevertheless, the importance of the case is to be found in the order issued by the Board which directed that the employer cease and desist from recognizing the competing union unless and until it had been certified by the National Labor Relations Board following an election. Thus, even assuming the facts of *Wolfer Printing* to be within the scope of the present case, that precedent *requires* application of the *Mid-West Piping* rule and does *not* preclude it.

Similarly, *Atlantic Freight Lines, Inc.*, 117 N.L.R.B. 464 (1956), is not authority against the position of petitioners in this case, both because that case involved the commission of an unfair labor practice by the union violative of Section 8(b)(4)(i)(A) of the Act in an

attempt to acquire jurisdiction over certain unrepresented employees and because, despite such attempted coercion the order of the Board, as in *Wolfer Printing, supra,* imposed a *Mid-West Piping* remedy, its order requiring that the union desist from giving effect to its agreement with the employer unless and until it was certified by the National Labor Relations Board.

III.

The United States Court of Appeals Has Never Held, Upon the Facts Presented Here, That an Employer May Disregard Its Obligation of Neutrality and Bargain With a Competing Union.

For the converse of the above statement, both the Board and intervenor have, in their briefs at pages 10 and 7, respectively, cited eight circuit decisions. Three of these decisions, *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F. 2d 176 (C.A. 8, 1964); *N.L.R.B. v. Knickerbocker Plastic Company,* 218 F. 2d 917 (C.A. 9, 1955); and *N.L.R.B. v. Signal Oil and Gas Company,* 303 F. 2d 785 (C.A. 5, 1962) actually applied the *Mid-West Piping* doctrine, finding that the rival unions involved both presented valid claims of representation.

Of the remaining five cases the facts substantially differed from those presented herein. In *N.L.R.B. v. Swift and Company,* 295 F. 2d 285 (C.A. 3, 1961) the employer had been negotiating a renewal of a collective bargaining agreement with one union when it received notice that another union had filed a representation petition with the Board seeking an election. There was no evidence produced to show any knowledge on the part of the employer that the incumbent union had somehow lost its majority status among the em-

ployees. As the Court pointed out, the Board did not offer evidence of the numbers or validity of the authorization cards obtained by the rival union, relying solely on its power under the act to determine that a question concerning representation exists and asking the Court to assume, in effect, that the Board had made such a determination.

In *N.L.R.B. v. Kickhaefer Corporation,* 292 F. 2d 130 (C.A. 7, 1961) the union with which the company was bargaining had been certified as exclusive collective bargaining representative within one year prior to the filing by the rival union of unfair labor practice charges. The Board presented no evidence that its general rule granting immunity to such certification for the one-year period would be, or should be, set aside.

In *N.L.R.B. v. Wheland Co.,* 271 F. 2d 122 (C.A. 6, 1959) a case in which three rival unions were participating, one union secured authorization cards from a majority of employees, the other two did nothing until well after the employer had recognized the first.

In *Cleaver-Brooks Manufacturing Company v. N.L.R.B.,* 264 F. 2d 637 (C.A. 7, 1959), the employer had real and immediate notice of the invalidity of one union's claim because a majority of its employees engaged in a near-riot ejecting the rival union representative from an employees' meeting. Immediately after the ejection, the employees signed and presented to the employer a petition asking for recognition of the other union.

Finally, in *N.L.R.B. v. Air Master Corp.,* 339 F. 2d 553 (C.A. 3, 1964) a team of employees of the company were bargaining with management when they announced that they and a majority of the other employees whom they represented had switched their affiliations to a new union. When the employer asked for proof it was forthcoming in a matter of hours.

It is significant that in many of these cases, the claims of representation for and on behalf of one or both of the competing unions came directly from the mouths of the employees themselves. See *e.g. Cleaver-Brooks Manufacturing Company v. N.L.R.B., supra,* and *N.L.R.B. v. Air Master Corp., supra.* In *N.L.R.B. v. Kiekhaefer Corporation, supra, Cleaver-Brooks Manufacturing Company, supra,* and *N.L.R.B. v. Signal Oil and Gas Company, supra,* the employees spoke through their own independent union.

From all of the foregoing, petitioner submits that it is apparent that neither the Board nor the Courts have yet so drastically limited the *Mid-West Piping* rule as to deny its application in the instant case. It is further submitted that, from the weight of the evidence, respondents have clearly assisted the Culinary Union in achieving its status as collective bargaining agent of the snack bar employees of Boy's and Von's by their misrepresentations to the Clerks [R.T. pp. 308-309] and to their employees [R.T. pp. 37-45] as if these respondents had been motivated so to do by an animus proscribed by Section 7 of the Act, 29 U.S.C. 157.

See *e.g. Ronney and Sons Furniture Manufacturing Company,* 93 N.L.R.B. No. 180, 27 L.R.R.M. 1524 (1951).

Conclusion.

For the foregoing reasons, petitioner respectfully requests that the relief prayed for in its Opening Brief be granted by the Court.

Dated: August 8, 1966.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ,
KENNETH M. SCHWARTZ,
ROBERT M. DOHRMANN,
By ROBERT M. DOHRMANN,
Attorneys for Petitioner.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROBERT M. DOHRMANN